Freedom of Information Act

aka “the Bane of our Existence”)

Allen B. Coe

SMC/JAQ

Overview

- FOIA Players
- FOIA Policy
- FOIA Process
- FOIA Exemptions
- Application of Exemptions

FOIA Players

- Requestor (unstoppable object)
- Submitter (irresistable force)
- Government (place where unstoppable object and irresistable force collide)

FOIA Policy

- "DoD personnel are expected to comply with FOIA, this regulation, and DoD FOIA policy in both letter and spirit." **DoD 5400.7-R**
- "Records not exempt from disclosure under the Act shall, upon request, be made readily accessible to the public…" **DoD 5400.7-R**

FOIA Process

- CO receives FOIA request
  - Who is the requestor?
    - Doesn’t matter
  - What does the requestor really want?
    - Don’t guess
    - OK to ask if requestor will narrow the request
      - SSDD
      - Contract w/modifications
    - Get a written response (e.g. email)

FOIA Process

- CO contacts the submitter
  - SMC/JAQ standard letter
    - Gets the contractor to provide redactions in a way where we can see what is redacted
    - Addresses the standard losing legal arguments up front
    - Explains the facts the contractor really needs to provide to support redaction
    - Explains our role

FOIA Process

- CO receives submitter response
  - "Release of this information would be contrary to the protections afforded by Exemption 4 to the FOIA and would cause substantial harm to our competitive position with respect to ongoing and future competitions."
  - Facts supporting conclusion????

FOIA Process

- CO receives submitter response cont.
  - Coordinate with JA
    - We can evaluate whether submitter's response is deficient – send another letter.
    - We can identify for you what is/is not releasable.

FOIA Process

- CO reviews information the submitter wants redacted, based upon:
  - Program office evaluation
    - If contract price information – What does the price represent? Is is current?
      - Cost estimate or fixed fee
      - Direct cost, overhead, G&A, fee, labor
      - How old is it?
    - If technical information – Is it generally known or does it really appear to be confidential information

FOIA Process

- CO reviews information the submitter wants redacted, based upon:
  - JA evaluation
    - What is the legal test?
    - Are there similar cases decided by the courts?
    - What is the burden of proof?

FOIA Process

- CO hands file over to JA
  - JA does legal review
  - JA does release over objection letter to submitter
    - May be further debate with submitter
  - JA does partial denial letter to requestor

FOIA Exemptions

- Exemption 3 – “specifically exempted from disclosure by statute” (5 U.S.C. 552(b)(3))
- Exemption 4 – “trade secrets and commercial or financial information obtained from a person and priviliged or confidential” (5 U.S.C. 552(b)(4))
- Exemption 5 – “inter-agency or intra-agency memorandums or letters which would not be available by law to a party…in litigation with the agency” (5 U.S.C. 552(b)(5))

Exemption 3

- **Export Controlled Data -** 10 U.S.C. §130 – "technical data with military or space application" requiring an export license
- **CRADA Data -** 15 U.S.C. §3710a(c)(7) – cooperative research and development agreements (CRADAs)

Exemption 3

- **Contractor Proposals not Incorporated in a Contract -** §821(b)(m) of NDAA for FY1997 (also 10 U.S.C. 2305(g) and 41 U.S.C. 253b(m))
  - "a proposal in the possession or control of an agency…may not be made available to any person under section 552 of title 5 [FOIA]"
  - "does not apply to any proposal that is set forth or incorporated by reference in a contract"
  - Ctr. for Pub. Integrity v. DOE, 191 F.Supp.2d 187

Exemption 3

- **Trade Secrets Act**, 18 U.S.C. 1905
  - **Trade Secrets Act does not fall within Exemption 3**
  - Look to Exemption 4
- CNA Financial Corp. v. Donovan, 830 F.2d 1132 – Trade Secrets Act not a withholding statute under Exemption 3

Exemption 4

- A FOIA exemption that protects
  - Trade secrets and
  - Commercial or financial information
    - obtained from a person
    - that is privileged or confidential

Exemption 4
Trade Secret

- A trade secret is
  - A secret, commercially valuable plan, formula, process, or device
  - That is used for the making, preparing, compounding, or processing of trade commodities and
  - Is an end product of either innovation or substantial effort
- A trade secret is <u>not</u>
  - Financial information
  - General management plans

Exemption 4
Commercial or Financial Information

- IF IT RELATES TO BUSINESS OR TRADE, IT IS COMMERCIAL OR FINANCIAL INFORMATION
- EXAMPLES
  - Business sales statistics
  - Research data
  - Technical designs
  - Customer and Supplier Lists

Exemption 4
Commercial or Financial Information

- EXAMPLES (CONTINUED)
  - Profit and loss data
  - Overhead and operating costs
  - Information on financial condition

Exemption 4
Commercial or Financial Information
Obtained from a Person

- Person includes
  - Corporations
  - State governments
  - Agencies of foreign governments
  - Individuals
- **DOES NOT COVER INFORMATION GENERATED BY FEDERAL GOVERNMENT**

Exemption 4
Commercial or Financial Information
Privileged or Confidential

- Privileged –
  - Very rare
  - Court privileges
    - Attorney work-product
    - Settlement negotiations

Exemption 4
Commercial or Financial Information
Privileged or **Confidential**

- NATIONAL PARKS & CONSERVATION ASS'N v. MORTON
  - Created a two part test; confidential if:
    - Disclosure is likely to impair the Government's ability to obtain necessary information in the future; or
    - **Disclosure is likely to cause substantial harm to the competitive position of the submitter**
  - Applies to information submitter obligated to furnish

Exemption 4
Commercial or Financial Information
Privileged or **Confidential**

- CRITICAL MASS ENERGY PROJECT v. NRC
  - Rare test where contractor gives government information voluntarily
  - Confidential if, "Would customarily not be released to the public"
  - Note – **information submitted to obtain a contract is not voluntarily submitted**

Exemption 4

Commercial or Financial Information

Privileged or **Confidential Impairment Prong**

- INFORMATION IS REQUIRED TO BE PROVIDED BUT DISCLOSURE WILL RESULT IN A DIMINUTION OF THE RELIABILITY OR QUALITY OF THE INFORMATION
  - Few cases on this prong
  - Court usually defers to agency's decision as the agency best knows what will impair it
    - However, minor impairment not sufficient

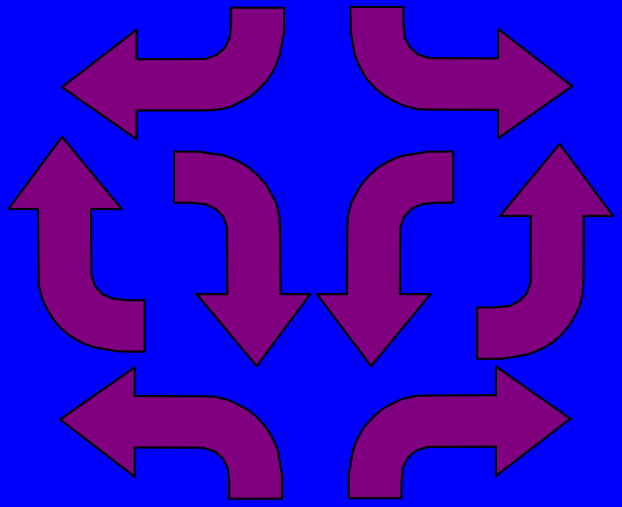
Exemption 4

Commercial or Financial Information

Privileged or **Confidential**

Competitive Harm Prong

- THIS IS THE ISSUE THAT WILL MAKE YOU WONDER IF YOU ARE COMING OR GOING



Exemption 4

Commercial or Financial Information

Privileged or **Confidential**

Competitive Harm Prong

- Likelihood that release of the information would cause substantial competitive harm
- General principles
  - Case by case determination
    - Customer lists – varying decisions
    - Table of contents – varying decisions
  - Consider submitter comments
  - Independent agency determination
  - Release any segregable portion

Exemption 4

Commercial or Financial Information

Privileged or **Confidential**

Competitive Harm Prong

- General principles continued
  - Competing interests
    - Strong public interest in favor of disclosure
    - Private business right to protect sensitive info
  - Burden of proof
    - Presumption in favor of disclosure
    - Burden on submitter to show likelihood of substantial competitive harm

Exemption 4
Commercial or Financial Information
Privileged or **Confidential**
Competitive Harm Prong

- General principles continued
  - Submitter proof (facts)
    - "elaborate antitrust proceedings" not required
    - "mere conclusory allegations of harm" are unacceptable
  - No harm if information is publicly available
  - Proprietary markings not conclusive

Exemption 5

- “inter-agency or intra-agency memorandums or letters which would not be available by law to a party … In litigation with the agency” (5 U.S.C. 552(b)(5))
- **Deliberative process privilege –** all predecisional intergovernmental memorandum (key issue is protection of source selection evaluation information)

Application of Exemptions

- Contract
- SOW and IMP
- Award Fee letters
- Source Selection Evaluation
- Subcontracting Plan
- Performance Reports

Application of Exemptions
Contract

- Confidential Financial Information (Exemption 4)
  - Unit Prices v. CLIN Prices
  - Cost v. Fixed Price
  - Fixed Fee v. Award Fee
  - Options and Special Services Ordering Clauses
  - Amount Funded v. Cost Estimate
  - Overrun
- Likely to cause substantial competitive harm

Application of Exemptions
Contract

- Likelihood of substantial competitive harm
- Two submitter arguments
  - If the requirement were recompeted today or in the future, release of this information would make it likely we would be underbid
  - An otherwise general price can be broken down

Application of Exemptions
Contract

- Examples of information that might be exempt
  - Detailed financial information
    - Assets, liabilities, and net worth
  - Actual detailed costs
  - Direct labor cost
  - Break-even calculations
  - Profits and profit rates

Application of Exemptions
Contract

- Information that is not detailed cost breakdowns or profit
- Factors to consider
  - Government generated information
  - Recency
  - Relevancy
  - Detail

Application of Exemptions
Contract

- Government generated information
  - ACRNs
  - Info SubCLINs
  - Amounts funded

Application of Exemptions
Contract

- Recency
  - Likelihood of substantial competitive harm - How useful would it be in a current competition for the same requirement?
    - Past price – Out of date?
    - Present price
    - Option price – Crystal ball?

Application of Exemptions
Contract

- Relevancy
  - Future competition
    - Was this a one time requirement?
    - Was it sole source?
    - How can it be used for other competitions?
  - Too old
  - Too speculative
  - Too vague

Application of Exemptions
Contract

- Detail
  - MCI Worldcom v. GSA – "complex matrices of figures in computer database format that specify the millions of pricing elements and pricing components that make up the individual calls or transmissions sold to the government"
  - Acumenics v DOJ – "too many unascertainable variables"

Application of Exemptions
Contract

- Example
  - Clause for Advanced Integration Studies
    - Estimated cost and fixed fee
    - Hourly labor rate
    - Years 1996 to 2012
  - Arguments
    - Release allows others to underbid
    - Release allows others to determine multiplier

Application of Exemptions
Contracts

- Example
  - SubCLIN – Depot Hardware Maintenance
    - Cost plus fixed fee
    - General work statement
    - Total number of hours
  - Arguments
    - Release allows underbidding
    - Release allows others to determine multiplier

Application of Exemptions
SOW and IMP

- Exemption 3 –
  - Export controlled information
  - Proposal information - NO
- Exemption 4 – Confidential commercial information – likelihood of substantial competitive harm
  - Public information
  - Truly unique and useful

Application of Exemptions
Award Fee Letters

- Exemption 3
  - Proposal information – NO
  - Performance information – NO
- Exemption 4
  - Confidential commercial information **obtained from a person** – NO
  - Government generated information
  - Too vague
- Exemption 5 – No, not predecisional

Application of Exemptions
Source Selection Evaluation

- Exemption 3
  - All contractor proposals – Exempt
- Exemption 4
  - Source Selection Decision Document –
    - Is it government generated information
    - Is it likely to cause substantial competitive harm
- Exemption 5
  - All government evaluations – Exempt as deliberative process

Application of Exemptions
Subcontracting Plan

- Exemption 3 – NO
- Exemption 4 – Maybe, courts have accepted arguments that disclosure is likely to cause substantial competitive harm – case by case basis
- Exemption 5 - NO

Application of Exemptions
Performance Reports

- Exemption 3 – NO
- Exemption 4 – NO, government generated information
- Exemption 5 – Exempt, CPARS information is generally exempted as part of the government deliberative process (Note – does not mean decisions are exempt – i.e. award fee decision document)

The End